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No. 625

IN THE

Supreme Court of the United States

OCTOBER TERM 1961.

THE HONORABLE ARCHIE O. DAWSON, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK,

Petitioner,

against

THE LUMMUS COMPANY,

Respondent.

BRIEF IN OPPOSITION.

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January 22, 1962

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BRIEF IN OPPOSITION.

Opinions Below.

The opinion of the Court of Appeals is not yet officially reported, but it is printed at pages 86-114 of petitioner's Supplemental Appendix (hereinafter referred to as "S. A."). The judgments of the Court of Appeals are printed at pages 115-17 of the Supplemental Appendix.* The order of the District Court which was reviewed by the Court of Appeals is printed at pages 83-85 of the Supplemental Appendix. The District Court's opinion is printed at pages 73-82 of the Supplemental Appendix.

Questions Presented.

Since petitioner's statement of the questions presented does not accurately represent the issues before this Court,

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* Subsequent to the filing of the opinion of the Court of Appeals for the Second Circuit Commonwealth applied in that court, and then in this Court, for a stay of the mandate of the Court of Appeals pending disposition of this petition. Both applications were denied, the mandate issued, and an order on mandate has been entered by the District Court.

a counterstatement of the questions presented is necessary. The questions presented to this Court are as follows:

1. Whether the Court of Appeals for the Second Circuit properly exercised its discretion in issuing a writ of mandamus to prevent the District Court from ordering a trial of certain issues of arbitrability, and staying arbitration pending such trial, where the principal issue ordered to trial had already been finally determined by another Court of Appeals in this same case, with certiorari denied, and where the arbitration had already been delayed for more than 30 months by judicial proceedings in connection with the issues of arbitrability raised by Commonwealth.

2. Whether the Court of Appeals for the Second Circuit properly held that the final determination of the Court of Appeals for the First Circuit that Commonwealth's claim of rescission for fraudulent inducement failed to raise a substantial issue, and this Court's denial of a Petition for Certiorari seeking review of that decision, precluded relitigation of that identical issue in the United States District Court for the Southern District of New York.

3. Whether the Court of Appeals correctly held that, once the District Court's order was before it for review, it might determine that none of the challenges to arbitrability made by Commonwealth was substantial or had any foundation in law, and direct the District Court to vacate the order which had required a trial of those issues.*

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* Petitioner also states a constitutional issue which it alleges to be raised by its Petition. As is pointed out hereafter, no constitutional issue is properly raised or presented to this Court.

Statement of the Case.

Commonwealth's Petition for Certiorari is the second which it has filed in this litigation in its attempt to evade arbitration. The present petition is no more meritorious than the one which this Court denied on December 5, 1960.

Since the present Petition for Certiorari fails to provide an accurate description of the rulings of the Court of Appeals for the Second Circuit and fails to place those rulings properly in context, a counterstatement of the case is required.

The Lummus Company performs professional engineering services in the design and construction of chemical plants of various kinds including particularly oil refineries and related equipment. Lummus has designed such plants all over the world (R. 122). By its two contracts with Commonwealth, executed on July 8, 1954 and March 14, 1956, respectively, Lummus agreed to design and construct for Commonwealth an oil refinery and an expansion refinery in Puerto Rico.

While Commonwealth likes to refer to "alleged" contracts between the parties and likes to refer to the contracts in quotation marks (Petition, p. 4), it is perfectly clear that two contracts, carefully drawn and carefully reviewed by both parties, were executed and that those contracts constitute the framework for the present litigation.

Each of these contracts contains an arbitration clause reading, in part, as follows:

> "Any controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in accordance with the rules, then obtaining, of the American Arbitration Association" (R. 42, 89).

Among the other significant provisions of each contract is the following:

> "All previous figures, proposals and agreements submitted by Contractor or Purchaser, either orally or written, pertaining to the work covered by this Agreement are cancelled" (R. 43, 90).

The contracts also defined in great detail the guarantees made by Lummus with respect to the performance of the refinery (R. 44-59, 91-101). The effect of these guarantees was that Lummus obligated itself to construct facilities which would, during a designated acceptance-test period and under defined conditions, produce from a particular carefully defined crude oil a specified yield of products. The contracts provided that if, on the conducting of acceptance tests, the plant failed to meet the guarantees Lummus would make such changes in the plant as were necessary to meet them (R. 29-30, 86). The contracts then stated:

> "Contractor's liability in respect to performance guarantees of the Plant is expressly limited to the extent stated in this section" (R. 30, 86).

Finally, the contracts provided that, if Lummus notified Commonwealth that it was ready to conduct acceptance tests and if Commonwealth failed to conduct the tests within 45 days and failed to pay the amount due to Lummus within that time, "all obligations of the Contractor with respect to initial operations or acceptance tests or performance guarantees shall terminate and it shall be deemed that the Purchaser has automatically accepted the plant" (R. 19-20, 81-82).

Pursuant to these contracts Lummus proceeded to design and construct the contemplated plants. As each of the plants was completed, Lummus discussed with Com-

monwealth the conducting of acceptance tests and requested Commonwealth to conduct such tests. Commonwealth resisted every effort by Lummus to conduct these acceptance tests which constituted the agreed-upon method of determining whether Lummus' obligations had been satisfied (R. 126-30). Commonwealth also withheld payment of sums due and payable to Lummus which eventually totalled $4,697,997.85 (R. 130).

Finally, on November 11, 1958, Lummus formally demanded that acceptance tests be conducted within 45 days in accordance with each contract. Commonwealth refused to conduct the tests (R. 129-30).

Since Commonwealth had frustrated the testing procedure which was designed to resolve any disputes between the parties as to the performance of the refinery and since Commonwealth persisted in its refusal to pay to Lummus the amounts due it for services rendered and materials supplied, Lummus resorted to the arbitration which the parties had provided for in their contracts. On April 29, 1959 Lummus served on Commonwealth a demand for arbitration wherein it sought arbitration of its claims against Commonwealth in the amount of $4,697,997.85 and of "any set-offs or counterclaims . . . which Commonwealth may assert" (R. 131, 109-10).

Upon receiving Lummus' demand for arbitration Commonwealth commenced, on May 4, 1959, an action against Lummus in the United States District Court for the District of Puerto Rico and at the same time moved in that court, pursuant to 32 Laws of Puerto Rico Annotated § 3204 (4)(a), for a stay of the arbitration which Lummus had demanded. Both the action and the motion were based entirely upon very general allegations by Commonwealth that certain studies and projections prepared by Lummus prior to the execution of the contracts were

either fraudulently misleading or constituted negligent misrepresentations (R. 111-20). Commonwealth requested rescission of the contracts and alleged that it had suffered damages in the amount of $60,000,000 and "other sums as yet undetermined" (R. 115).

Prior to the filing of the complaint and motion on May 4, 1959, Commonwealth had never suggested in any way that Lummus had been guilty of fraud, nor had it ever sought to rescind the contracts (R. 132). Indeed, it had repeatedly relied upon the contracts and evidenced its intention to affirm them (R. 138-43).*

On May 20, 1959 Lummus petitioned the Supreme Court of the State of New York for New York County for an order compelling the arbitration which it had demanded (R. 4). This proceeding was thereafter removed by Commonwealth to the United States District Court for the Southern District of New York (R. 1).

Under the Puerto Rican arbitration statute, as well as under the New York statute, the procedure on a motion to

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* In a lengthy footnote Commonwealth makes a number of statements about the factual background of this litigation which find no support whatever in the record (Petition, pp. 5-6, note). Since none of this material is relevant here, no extended response will be attempted. As an example, however, it may be noted that the record does not show that the refineries were "incapable of fulfilling" any representations made by Lummus. Commonwealth's frustration of all of Lummus' efforts to conduct acceptance tests prevented any determination of what the refineries were "capable of producing" (R. 126-30). It is Lummus' view that the failure of the plant to reach anticipated levels of profitability during its first few years of operation was due in part to deficiencies in Commonwealth's operation of the plant and in part to electrical and other difficulties originating outside the plant (e.g., R. 341). The flimsiness of the evidence advanced by Commonwealth in its effort to show that Lummus failed to meet proper standards of professional engineering was commented upon by the Court of Appeals for the First Circuit in its opinion in this case (S. A., p. 47). Oddly, Commonwealth seems to feel that its claim is somehow enhanced by the fact that it has been "publicly and repeatedly" asserted (Petition, p. 6, note).

stay arbitration is that the party moving for the stay must present evidence sufficient to show that a substantial issue exists with respect to the making or existence of the arbitration agreements. 32 Laws of Puerto Rico Annotated §3204(4)(a); New York Civil Practice Act §1458(2). If a substantial issue is shown to exist a trial must be held. If no substantial issue is shown, the motion must fail.

Commonwealth presented in the District Court in Puerto Rico extensive documentary evidence and affidavits in an effort to raise such an issue; Lummus presented affidavits and documentary evidence in opposition to Commonwealth's motion. On the basis of the voluminous record thus built up, the District Court in Puerto Rico concluded that a substantial issue had been raised. It therefore directed a trial of that issue and stayed the arbitration and the proceeding commenced by Lummus in New York pending that trial.

Lummus appealed from this order. In a comprehensive opinion by Judge Aldrich the Court of Appeals for the First Circuit held unanimously that the decision of the District Court must be reversed and that its order must be vacated (S. A., pp. 33-67). In reaching that conclusion the Court of Appeals carefully weighed the evidence submitted by both parties and held that:

> "... Commonwealth failed to raise a substantial issue as to the making or the existence of the contracts ..." (S. A., p. 65).

Briefly stated, the grounds for the ruling of the Court of Appeals were that in order to avoid the arbitration agreements, Commonwealth must show a presently existing right to rescind the contracts in which they were embodied, that Commonwealth had failed to show such a right since it had not properly sought a rescission of the contracts and had not tendered back the consideration received, and that, in any event, Commonwealth had forfeited any right to

rescind by its inordinate delay in asserting such a right and by its affirmance of the contracts long after all relevant information had come into its possession.*

Commonwealth petitioned the Court of Appeals for a rehearing, tendering affidavits which purported to show that the basis for its claim of fraudulent inducement had only recently come into its possession. The Court of Appeals denied the petition for rehearing and refused to receive the tendered evidence. The affidavits submitted by Commonwealth revealed that the information contained in them was in Commonwealth's possession long before the record in the District Court was made (R. 534), and the Court of Appeals pointed out that Commonwealth had failed to make any adequate explanation why this information had not been submitted earlier (S. A., p. 70). The Court of Appeals had pointed out in its original opinion that Commonwealth had had an "opportunity to make a full presentation" (S. A., p. 63).

Commonwealth thereafter filed in this Court a Petition for Certiorari seeking a review of the decision of the Court of Appeals. In its petition Commonwealth emphasized and repeatedly stated to this Court that the decision of the Court of Appeals had finally rejected its claim of fraudulent inducement and precluded relitigation of that issue. Thus Commonwealth said in its petition:

> "The effect is to grant summary judgment against petitioner . . . and to preclude any reexamination of these issues of merit" (Petition for Certiorari, October Term 1960, No. 455, p. 23).

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* Commonwealth lays emphasis on certain findings in which it suggests that three judges concurred, Judge Magruder, Judge Ruiz Nazario, and Judge Dawson (Petition, p. 5). It should be noted that both Judge Magruder's rulings and Judge Ruiz Nazario's rulings were vacated by a judgment of the Court of Appeals for the First Circuit which this Court declined to review (S. A., pp. 66-67).

In objecting to the refusal of the Court of Appeals to accept the affidavits proffered in support of its petition for rehearing, Commonwealth also said to this Court that it was "forever precluded" from making this proof (Petition for Certiorari, October Term 1960, No. 455, p. 22).

Commonwealth's Petition for Certiorari was denied by this Court on December 5, 1960.

After the District Court in Puerto Rico had entered an order on mandate, on January 3, 1961 (R. 525), giving effect to the decision of the Court of Appeals, Lummus immediately wrote to the American Arbitration Association requesting it to continue with the administration of the arbitration (R. 618). It was Lummus' view that Commonwealth's objections to arbitration had been finally resolved and that no further impediment to the continuance of the arbitration existed. In taking this position Lummus relied on the decision of the Court of Appeals for the First Circuit and on Commonwealth's stated views as to the effect of that decision. In Lummus' opinion a decision on the petition to compel arbitration which it had filed in New York was not a necessary antecedent to the arbitration, since Commonwealth's objections to the arbitration had already been disposed of.

Commonwealth countered by filing an answer to Lummus' petition to compel arbitration (R. 435) and by moving in the Southern District of New York for a stay of the arbitration pending a trial of the issues of arbitrability which it alleged had been raised (R. 446).

In its answer and by its motion Commonwealth tendered, first of all, the very same argument which had been tendered to, and rejected by, the Court of Appeals for the First Circuit. That is, it argued that the contracts containing the arbitration agreement had been fraudulently

induced and could be rescinded. The evidence which it tendered in support of this claim was the very same evidence which had made up the record in the District Court in Puerto Rico, together with the affidavits submitted to, and rejected by, the Court of Appeals for the First Circuit.

In its answer and motion for a stay, Commonwealth also presented two additional objections to arbitrability which had not previously been seriously urged. It argued first that a particular clause of the arbitration agreement relating to claims covered by certain insurance barred arbitration of the claims here involved. It also argued that some elements of Lummus' claim were for particular items which fell outside the scope of the arbitration clauses.

Judge Dawson held that Commonwealth had raised substantial issues and that these issues should be ordered to trial (S.A., p. 73). He therefore entered an order directing a trial of all of the issues raised by Commonwealth and stayed the arbitration pending such trial (S.A., p. 83). Judge Dawson did not discuss in his opinion the contentions of the parties nor did he explain why an issue already determined in litigation going all the way to this Court should be relitigated.

Lummus filed a notice of appeal with respect to Judge Dawson's order and, recognizing that the appealability of the order might be called in question, also filed a petition for a writ of mandamus.

The case was originally ordered by Judge Dawson to be placed on the Ready Day Calendar for October 16, 1961, but subsequently, by a consent order signed by Judge Dawson (R. 751), the trial was adjourned until 90 days after determination of the appeal and petition for mandamus. The parties also joined in a motion in the Court of Appeals for a consolidated hearing on the appeal and the

petition and for the advancement of the case on the calendar of the Court of Appeals. This motion was granted and the case was set down for argument on September 25, 196[illegible].

In a comprehensive opinion by Judge Friendly (S. A., pp. 86-114), the Court of Appeals unanimously held that the appeal should be dismissed for lack of appellate jurisdiction, but that the petition for writ of mandamus should be granted.

With respect to the propriety of mandamus, the Court held that, in the context of these arbitration proceedings, and in a situation where arbitration had already been delayed for more than 30 months, the writ might properly issue to compel the District Court to set aside an order directing a trial of an issue already finally and conclusively determined by another Court of Appeals. The Court held that the combination of considerations present here constituted the exceptional circumstances which justify use of this extraordinary remedy (S. A., pp. 97-98).

The Court next held that since it was plain that the Court of Appeals for the First Circuit had already finally determined the identical issue raised here by Commonwealth in its claim of fraudulent inducement, that decision should be given effect and a trial of this issue should not take place (S. A., pp. 100-05).

Finally, the Court turned to the other issues of arbitrability, which it regarded as not finally determined by the Court of Appeals for the First Circuit. With respect to these issues, the Court took the view that it had some discretion in determining whether it would, on the petition for mandamus, consider them or not. Since it found those issues insubstantial and without foundation in law, the Court concluded that it might properly resolve them. In reaching this conclusion the Court noted that nearly two

and a half years had already elapsed since Lummus demanded arbitration and that there could be no purpose in permitting a trial with respect to these issues when all of the material needed for their disposition was before the Court of Appeals and when any determination by the District Court in Commonwealth's favor would ultimately have to be reversed as erroneous in law (S. A., p. 106).

Commonwealth's Petition for Certiorari seeks to challenge these rulings of the Court of Appeals.

ARGUMENT.

The Court of Appeals properly held that the writ of mandamus was an appropriate remedy for dealing with the extraordinary situation presented by this case. The policy favoring expedition in judicial proceedings antecedent to arbitration, the long delay which had already occurred in connection with this arbitration, and the District Court's complete disregard of previous rulings made by another Court of Appeals in this same case, combined to make the issuance of the writ appropriate.

Since the Court of Appeals for the First Circuit had ruled on the very same issue tendered by Commonwealth in the Southern District of New York and had conclusively and finally determined that issue, the Court of Appeals for the Second Circuit correctly held that any further litigation of the issue was precluded.

The Court of Appeals for the Second Circuit also correctly held that, with the case already before it for review, it might properly consider the additional issues raised by Commonwealth and, upon concluding that those issues were insubstantial and without legal foundation, vacate Judge Dawson's order directing their trial.

Finally, Commonwealth's alleged constitutional issue was not raised below and is, in any event, entirely frivolous.

None of the issues raised by Commonwealth's petition is of such a nature as to warrant this Court's granting the writ and reviewing the decision of the Court of Appeals.

I.

There is no reason for this Court to review the Court of Appeals' exercise of its discretion in granting the writ of mandamus.

In its prior decisions this Court has carefully considered the practice which should be pursued by the federal courts of appeals with respect to the issuance of writs of mandamus and defined, insofar as definition is possible, the considerations which should govern that practice. In these prior decisions this Court has emphasized that the only real question involved in the issuance of such a writ by a court of appeals is the question whether the court properly exercised its discretion in the particular circumstances before it. E.g., *LaBuy* v. *Howes Leather Co.*, 352 U. S. 249, (1957); *Roche* v. *Evaporated Milk Association*, 319 U. S. 21, 26 (1943).

The nature of the remedy of mandamus makes a precise definition of the circumstances in which it may properly be used impossible. As this Court said in *Roche* v. *Evaporated Milk Association*, *supra*, relied on by petitioner (Petition for Certiorari, p. 19), the question presented on review of an order granting a writ of mandamus is whether "in the light of all the circumstances" the case was an appropriate one for exercising that power:

> "In determining what is appropriate we look to those principles which should guide judicial discre-

> tion in the use of an extraordinary remedy rather than to formal rules rigorously controlling judicial action" (319 U. S. at 26).

Recognizing that the circumstances in which mandamus is appropriate could only be precisely defined by this Court if it reviewed itself every such petition submitted to a court of appeals, this Court has limited itself to establishing general guide lines to assist the courts of appeals in exercising their function. It is submitted that the guide lines heretofore established are entirely sufficient, that the courts of appeals have had no significant difficulty in following them, and that they have been accurately applied here.

Among the many circumstances which formed the basis of the judgment of the Court of Appeals that mandamus should issue in this case were the following:

1. The proceeding before the court was a proceeding to compel arbitration; it is the intent and purpose of arbitration statutes, both state and federal, that such proceedings should provide a means for expeditious enforcement of arbitration agreements. It is the intention of these statutes that the judicial proceedings antecedent to arbitration should be a brief prelude, not a lengthy litigation.

2. The arbitration in this case was initially demanded by Lummus on April 29, 1959. The judicial proceedings by which Commonwealth has sought to challenge the arbitration had already consumed more than thirty months at the time when the Court of Appeals rendered its decision.

3. The principal issue which the District Court had ordered to trial was an issue already finally determined

by another federal court of appeals, with certiorari denied by this Court.

4. Both parties had joined in recognizing the extraordinary character of the issues presented by the petition for mandamus and the need for their early resolution; the parties had mutually consented to a stay of the trial pending review in the Court of Appeals and they joined in a motion requesting the Court of Appeals to place the matter at the head of its calendar. In their joint motion in the Court of Appeals the parties concurred in the statement that the trial which Judge Dawson had ordered "is likely to be lengthy, complex, and expensive to the parties. . . ." In their joint motion the parties also concurred in the statement that ". . . a determination of the appeal or the petition for mandamus in favor of Lummus may either obviate a trial in the Court below, limit the issues to be tried, or result in a trial of the issues before arbitrators."

The Court of Appeals did not hold, as Commonwealth seems to suggest (Petition for Certiorari, p. 19), that mandamus is appropriate whenever it would avoid a possibly needless trial. Indeed, the Court of Appeals expressly rejected any such ruling (S. A., p. 98).

Rather than adopting any such pervasive principle, the court merely held that the peculiar combination of circumstances here, particularly the 30-month delay in arbitration that had already occurred and the District Court's disregard of a conclusive determination by another Court of Appeals, made the extraordinary remedy appropriate.

The Court of Appeals properly drew analogies from other cases in which mandamus had been used to protect the right to jury trial, the right to trial before an unbiased judge and the right to trial by a judge rather than by a master (S. A., p. 98). It has been recognized that the extra-

ordinary writ may be issued where necessary "in the interest of justice", and particularly where it is necessary to protect the "public confidence in the courts. . . ." E.g., *In Re Union Leader Corp.*, 292 F. 2d 381, 383-84 (1st Cir. 1961), *cert. denied*, 30 U. S. Law Week 3180 (Dec. 4, 1961), and cases there cited. Certainly both the interest in justice and the public confidence in the courts are impaired by repeated relitigation of issues already finally determined on appeal, particularly in a context where there is a great interest in expedition.

The cases relied upon by Commonwealth fail to establish either that the instant decision is in conflict with the rulings of other federal courts or that the courts of appeals have experienced any significant difficulty in applying the principles enunciated by this Court with respect to the proper usage of the writ of mandamus.

The cases principally relied upon by Commonwealth in seeking to suggest the existence of a conflict are *Gulf Research & Development Co.* v. *Leahy*, 193 F. 2d 302 (3d Cir. 1951), *affirmed by an equally divided Court on other issues*, 344 U. S. 861 (1952), and *TCF Film Corp.* v. *Gourley*, 240 F. 2d 711 (3d Cir. 1957). In the latter case the court did not even rule on the question of the propriety of mandamus in the circumstances there before it; rather it specifically reserved decision on that question (240 F. 2d at 714, Note 5). In any event, the circumstances before the court in that case were not comparable to those presented here. There the court was not considering the failure of a District Court to give effect to a decision of a Court of Appeals for another Circuit, but rather was considering the rule of comity applicable as between decisions by different judges of the same court. No unusual circumstances were involved.

Nor is the decision in the *Gulf Research* case in any way comparable to this one. There the order of which

review was sought properly gave conclusive effect to a prior ruling of another court and there were no extraordinary factors present which would have made mandamus an appropriate remedy.

The other court of appeals' decisions relied upon by Commonwealth merely represent situations, in no way comparable to the situation here, in which particular courts have held mandamus to be inappropriate in particular circumstances. The principles applied in those cases are not in conflict with the principles applied by the Court of Appeals here.

For example, in *Byram Concretanks, Inc.* v. *Meaney*, 286 F. 2d 170 (3d Cir. 1961), review was sought of an order with respect to the scope of interrogatories. In *Hotel Corp. of Cleveland* v. *United States District Court*, 283 F. 2d 470 (6th Cir. 1960), the order of which review was sought related merely to the amendment of a complaint. Such orders were obviously not the proper subject of a petition for mandamus and the Second Circuit would undoubtedly concur in these and similar rulings.

Nor do the decisions of this Court cited by Commonwealth suggest that the Court of Appeals has here deviated from the principles laid down by this Court. The decisions cited by petitioner at page 19 of its petition were carefully considered by this Court in the *LaBuy* case and any further discussion of them here is superfluous. None of those decisions involved circumstances even remotely comparable to those presented here.*

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* It should be noted that some of the decisions relied upon by petitioner were based upon the particular statutes governing appellate review of orders remanding, or refusing to remand, cases to the state courts. In this category are *Ex parte Roe*, 234 U. S. 70 (1914); *Ex parte Harding*, 219 U. S. 363 (1911); and *Ex parte Hoard*, 105 U. S. 578 (1881). See *United States* v. *Rice*, 327 U. S. 742, 750 (1946). It is obvious that no implications can be drawn from these cases with respect to the propriety of mandamus in connection with orders not relating to remand.

This Court has heretofore articulated, insofar as they can be articulated, the principles which should govern the issuance by the courts of appeals of writs of mandamus. There is no evidence that the courts of appeals have experienced significant difficulty in applying those principles. The Court of Appeals has in the instant case adhered precisely to the rules laid down by this Court. Under these circumstances, petitioner has failed to show any basis for review by this Court of the decision below.

II.

The Court of Appeals for the Second Circuit correctly held the prior determination of the Court of Appeals for the First Circuit to be conclusive with respect to Commonwealth's claim of rescission for fraudulent inducement.

Commonwealth next urges that the court below was wrong in giving conclusive effect to the prior decision of the Court of Appeals for the First Circuit and that its ruling was contrary to decisions of this Court and inconsistent with the rules applied by other courts of appeals.

An analysis of the decision of the Court of Appeals for the First Circuit and a review of the reasoning employed and cases cited by the court below make it apparent that the decision below was correct and that it is not inconsistent with the decisions of this Court or of any other federal court.

Commonwealth's discussion of this issue tends to obscure the fact that the proceeding in the District Court for the District of Puerto Rico had two aspects. First, there was the proceeding commenced by Commonwealth's complaint in that court; this was an ordinary action for rescis-

sion and damages. Second, there was a motion by Commonwealth, pursuant to 32 Laws of Puerto Rico Annotated § 3204(4)(a), for a stay of the arbitration. This was a separate proceeding which might have been brought independently. It was the same kind of proceeding as that authorized by the corresponding provision of the New York Civil Practice Act, Section 1458(2).

As has been pointed out above, the procedure on a motion to stay arbitration is that the court must first determine whether a substantial issue exists. If a substantial issue is found, a trial must be held. If no substantial issue is shown to exist, the motion must be denied.

The District Court in Puerto Rico found a substantial issue and ordered a trial. The Court of Appeals for the First Circuit, after a careful analysis of the evidence, reversed the District Court's determination that a substantial issue existed. This ruling finally disposed of Commonwealth's motion.

The issue which Commonwealth subsequently sought to raise by the claim of fraudulent inducement which it asserted in the Southern District of New York was precisely the same issue which had previously been litigated and finally determined by the Court of Appeals for the First Circuit.

While the context here is somewhat unusual since it is seldom that a party seeks to litigate the question of arbitrability twice in different fora, and there are consequently few direct precedents, it is apparent that the court below accurately applied traditional principles of *res judicata*.

The court below quite properly analogized the instant case to cases in which a motion for summary judgment has been granted (S. A., p. 105). It is, of course, clearly settled that an order granting a motion for summary judgment constitutes a conclusive determination of the issues adjudi-

cated and is entitled to a *res judicata* effect. E.g., *Martucci* v. *Mayer*, 210 F. 2d 259, 260 (3d Cir. 1954); *Stokke* v. *Southern Pacific Co.*, 169 F. 2d 42 (10th Cir. 1948); *Banke* v. *Novadel-Agene Corporation*, 130 F. 2d 99 (6th Cir. 1942), *cert. denied*, 317 U. S. 692 (1942). A decision on such a motion, like the decision of the First Circuit here, determines that no substantial triable issue has been raised.

There are precedents directly in point in the New York Courts. As the court below pointed out in its opinion, the New York Courts have held that an order directing arbitration, *Matter of Marchant* v. *Mead-Morrison Manufacturing Co.*, 252 N. Y. 284, 169 N. E. 386 (1929), and an order refusing a stay of arbitration, *Reo Garment Inc.* v. *Jason Corp.*, 6 App. Div. 2d 401, 178 N. Y. S. 2d 368 (1st Dep't 1958), *aff'd*, 6 N. Y. 2d 725, 158 N. E. 2d 505, 185 N. Y. S. 2d 812 (1959), are *res judicata*.

The court below also properly emphasized the practical necessity of such a rule if repetitive and time-wasting litigation of the question of arbitrability is to be avoided.

The principal decisions now cited by Commonwealth in opposition to the ruling of the Court of Appeals are *Kloeb* v. *Armour & Co.*, 311 U. S. 199 (1940), and *Hoffman* v. *Blaski*, 363 U. S. 335 (1960). It is interesting to note that Commonwealth, in arguing to the Court of Appeals, did not regard these decisions as sufficiently relevant to warrant their inclusion in its briefs. It is submitted that Commonwealth's judgment in omitting these cases from its briefs in the court below was sounder than its judgment now.

The *Kloeb* case involved the peculiar situation which existed prior to 1948 whereby a petition for removal of a case from a state to a federal court was first to be filed in the state court. Under that procedure it was possible for the question of removability, *i.e.*, the question whether the

federal court had jurisdiction, to be ruled upon both by the state and by the federal court.

In the *Kloeb* case the state court had held the case to be removable. The federal District Court held that it was not bound by the state court's determination of the existence of federal jurisdiction. The Court of Appeals reversed the determination of the District Court and held that the state court's ruling was binding.

The actual holding of this Court in the *Kloeb* case is in no way relevant here. The holding was merely that the statutes governing removal and remand barred any review by the Court of Appeals of the District Court's decision.

Even the dictum upon which Commonwealth apparently relies is entirely irrelevant. The Supreme Court said merely that the federal court was free to determine its own jurisdiction and that it could not be bound *on this question* by the prior ruling of the state court. That this was the sense of the *Kloeb* case has been recognized in all subsequent discussion of that case. See, e.g., *Note*, 98 *University of Pennsylvania Law Review* 80, 81 (1949); *Note*, 50 *Yale Law Journal* 158 (1940). See also *Chesapeake & Ohio Railway* v. *McCabe*, 213 U. S. 207 (1909). In the converse situation it has been recognized that a determination by the federal court that it does have jurisdiction is conclusive in subsequent state court proceedings. E.g., *Chesapeake & Ohio Railway* v. *McCabe*, *supra*. It is therefore clear that the *Kloeb* case cannot properly be cited for any general principle of non-finality.

The decision of a divided court in *Hoffman* v. *Blaski*, *supra*, is of no more relevance than the *Kloeb* case. In the *Hoffman* case an unusual situation was presented in which the District Court for the Northern District of Texas had ordered a transfer, under 28 U. S. C. §1404(a), of an action commenced in that court to the United States District Court

for the Northern District of Illinois. The Court of Appeals for the Fifth Circuit declined to issue a writ of mandamus to review that decision. The District Court in Illinois received the transfer and denied a motion to remand the case to Texas. On review by the Court of Appeals for the Seventh Circuit it was held that the transfer was unjustified and the case should be remanded to Texas.

A majority of this Court held that, for various reasons arising out of the peculiarities of the situation which had developed in that case, the decisions of the Texas District Court and the Fifth Circuit could not be regarded as conclusive. One of the bases for this decision was the majority's view that the order of the Texas court "did not purport to determine the jurisdiction of the transferee court and therefore did not preclude Judge Hoffman of power to determine his own jurisdiction, nor did it preclude the power of the Seventh Circuit to review his action" (363 U. S. at 340, note 9). The majority also took the view that the Fifth Circuit, by declining to entertain the petition for mandamus to protect its appellate jurisdiction "did not thereby determine that the Illinois District Court had jurisdiction of the action." The majority opinion also noted that the ruling of the Texas District Court was interlocutory and not upon the merits. As has been pointed out above, this is not the case with respect to the order before the Court now. Here the order of the Court of Appeals for the First Circuit was final because it finally disposed of Commonwealth's motion to stay arbitration. It was on the merits because the basis of the court's decision was that the evidence presented by the parties on the substantive issues raised by the motion demonstrated that no substantial issue existed.

The rule properly applicable in this case, and which the Court of Appeals applied, was well stated by this Court

in *Baldwin* v. *Iowa State Traveling Men's Assoc.*, 283 U. S. 522 (1931):

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause" (283 U. S. at 525-26).

Nor are the court of appeals' cases which Commonwealth cites in any way inconsistent with the ruling of the Court of Appeals here. Commonwealth states at page 24 of its petition that certain decisions of the Seventh and Eighth Circuits have expressed a rule contrary to that applied here by the Second Circuit. The cases cited, however, are cases standing only for the familiar proposition that a ruling which grants or denies a preliminary injunction is not decisive of the merits of the litigation in which it is entered. The Court of Appeals in this case recognized that rule in its opinion in distinguishing the cases relied upon by Commonwealth (S. A., pp. 102-03). Far from disagreeing with the cases which Commonwealth cites, the court below recognized the validity of those decisions but concluded that they were inapplicable to the case before it.

The court below was plainly on solid ground in distinguishing the cases relied upon by Commonwealth. In the ordinary case where a motion for a preliminary injunction is made and is denied, the party seeking injunctive relief may still move forward with his suit for a permanent

injunction. In granting or denying preliminary injunctive relief the Court customarily makes no effort to weigh the ultimate merits of the suit; thus the tentative conclusions which form the basis for the order with respect to temporary injunctive relief cannot properly be given effect as an adjudication of the merits.

In contrast, where, as here, a motion for stay of arbitration is made, and when it is determined that no substantial issue as to arbitrability has been shown, there is no occasion for a trial or for any other judicial proceedings. The merits of the litigation have been determined and the matter is at an end.

Even if the judgment of the Court of Appeals for the First Circuit could be regarded as in some sense interlocutory, this would not deprive it of conclusive effect. In numerous decisions the federal courts have held that interlocutory decisions are frequently conclusive with respect to issues actually litigated and determined. E.g., *Larkin Automotive Parts Co.* v. *Bassick Manufacturing Co.*, 19 F. 2d 944 (7th Cir. 1927); *Sewerage Commission of City of Milwaukee* v. *Activated Sludge*, 81 F. 2d 22, 23 (7th Cir. 1936); *Bee Mach. Co., Inc.* v. *Freeman*, 131 F. 2d 190, 193 (1st Cir. 1942), *aff'd*, 319 U. S. 448 (1943); *J. R. Clark Co.* v. *Jones & Laughlin Steel Corp.*, 288 F. 2d 279 (7th Cir. 1961), *cert. denied*, 368 U. S. 828 (1961); *Carson Investment Co.* v. *Anaconda Copper Mining Co.*, 26 F. 2d 651 (9th Cir. 1928).

The Court of Appeals accurately applied the principles of *res judicata* which have been formulated and applied in the federal courts and there is no reason for this Court to review its judgment. Even if there could be any question as to the correctness of the decision, however, there would be no warrant for intervention by this Court. The decision

below revolved around the construction of the particular opinion and judgment entered by the Court of Appeals for the First Circuit, an assessment of the intention of the First Circuit, and a determination of what effect should be given that judgment under the particular circumstances of these proceedings. It is apparent that no issue is raised which calls for consideration by this Court.

III.

The Court of Appeals properly considered and determined the issues of arbitrability which it regarded as not conclusively determined by the First Circuit.

Commonwealth next objects to the action of the court below in directing Judge Dawson to vacate that part of his order which would have required a trial of certain issues which the court below held had not been adjudicated by the First Circuit. It is Commonwealth's contention that, even though the record contained everything necessary for a resolution of these issues, and even though it was apparent to the Court of Appeals that Commonwealth's contentions were erroneous as a matter of law and any decision in Commonwealth's favor would have to be reversed on appeal, the Court should have allowed the District Court to proceed with an unnecessary trial.

It is submitted that, once the Court of Appeals had determined to entertain the petition for mandamus for the reasons set out above, it was perfectly justified in going ahead with the consideration of the other issues which had been considered and determined by Judge Dawson and in directing Judge Dawson to vacate his erroneous rulings.

It is well settled that when a case is properly before an appellate court for review of an interlocutory order, the

Court is not restricted to the issues raised by the interlocutory order, but may properly consider other rulings made by the lower court. E.g., *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282, 287 (1940); *Smith* v. *Vulcan Iron Works*, 165 U. S. 518 (1897); *North Carolina Railroad Co.* v. *Storey*, 268 U. S. 288 (1925). As this Court said in the *Storey* case:

> "By the ordinary practice in equity as administered in England and this country an appellate court has the power on appeal from a temporary or interlocutory order or decree, to examine the merits of the case if sufficiently shown by the pleadings and the record and upon deciding them in favor of the defendant to dismiss the bill and save both parties the needless expense of further prosecution of the suit" (268 U. S. at 292).

While Commonwealth suggests (Petition, pp. 26-27) that the record was not complete and that it "had no opportunity to present evidence to rebut the inferences drawn by the Second Circuit from [the evidence submitted by Lummus]," this suggestion is absolutely unfounded. The facts upon which the Court of Appeals relied were established by affidavits and documentary evidence submitted by Lummus. Although Commonwealth had an opportunity to submit whatever affidavits or other evidence it chose to present, it presented nothing which in any way controverted the evidence submitted by Lummus. Indeed, as the Court of Appeals pointed out in its opinion (S. A., p. 110), Commonwealth did not deny, by evidence or otherwise, that the facts were as Lummus stated them to be.

Under all of these circumstances it is clear that the Court of Appeals did not abuse its discretion in holding that Judge Dawson's order should be vacated in all of its aspects.

IV.

Commonwealth's constitutional rights have not been in any way infringed.

The weakness of Commonwealth's petition appears perhaps most clearly in the speciousness of the constitutional argument with which it seeks finally to pique the interest of the Court.

The alleged constitutional issue must be disregarded, first of all, simply because it comes too late. No such issue was presented to or argued before the Second Circuit. Commonwealth in no way suggested in that court that a reversal or vacation of Judge Dawson's order would impair any of its constitutional rights.

This Court has frequently held that on appeal from the decision of a federal Court of Appeals it will not hear issues which were not raised below except in "exceptional circumstances." E.g., *Lawn* v. *United States*, 355 U. S. 339, 362, note 16 (1958). This same rule is applied when an attempt is made to raise constitutional issues which were not previously urged. *Duignan* v. *United States*, 274 U. S. 195, 200 (1927); *cf.*, *Ullmann* v. *United States*, 350 U. S. 422, 439, note 15 (1956). There are no exceptional circumstances present here which would justify entertaining a constitutional issue first advanced in this Court.

It is impossible, in any event, to follow the twists and turns of the reasoning by which Commonwealth attempts to suggest that it has been deprived of a constitutional right to litigate the question whether it consented to the agreements to arbitrate.

Commonwealth has at all times admitted that its contracts with Lummus contained arbitration clauses and that

it signed those contracts knowing that they contained those clauses. Under these circumstances, there could be no constitutional defect in a rule which said that the arbitration clauses are separable agreements and that, by signing the contracts in which they were embodied, Commonwealth consented to the arbitration of every issue which might arise between the parties. There is nothing to the contrary in *Dorchy* v. *Kansas*, 264 U. S. 286 (1924), or *Chas. Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522 (1923), relied on by Commonwealth (Petition, p. 28).

Here, however, no such rule has been applied. Commonwealth has litigated for nearly three years on this very question of "non-consent" with respect to which it claims it has not been adequately heard.

It was precisely this claim—that it had not validly consented to the making of the arbitration agreement—upon which Commonwealth compiled a record in the District Court in Puerto Rico which totalled some 588 printed pages. It was precisely this issue which the Court of Appeals for the First Circuit carefully considered and found to be insubstantial. It was precisely this issue that the Court of Appeals for the Second Circuit held had been finally adjudicated by the First Circuit.

It is difficult to believe that Commonwealth is now serious in suggesting that the requirements of due process have not been met with respect to its right to litigate this question.

Conclusion.

The decision of the Court of Appeals was in all respects correct. Petitioner has presented no issue which would warrant a review by this Court.

Respectfully submitted,

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